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No. 84-172

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THOMAS G. HETZEL,
Petitioner,

v.

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, who was admitted to practice law in the State of Wisconsin in 1968, petitions for a writ of certiorari for review of the Wisconsin Supreme Court's decision and order imposing discipline under Wisconsin Supreme Court Rule (hereafter "SCR") 21.05(4) and (5) which provides:

> SCR 21.05 Grounds for discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:
>
> (4) The code of professional responsibility under SCR chapter 20.
>
> (5) A standard of professional conduct as defined by the supreme court by rule, order or decision.

The Wisconsin Supreme Court's decision and order concluded a disciplinary proceeding commenced by the Wisconsin Attorneys' Board of

Professional Responsibility, by the filing of a fourth amended complaint on April 29, 1983. A hearing was held March 8, 10 and July 1, 1983, before a referee appointed by the Wisconsin Supreme Court. On September 13, 1983, the referee filed his report containing his findings of fact and a recommendation that petitioner's license be suspended for a minimum of one year as discipline for professional misconduct. The Wisconsin Supreme Court then reviewed the referee's report and in its decision and order, dated April 24, 1984, accepted his findings on all but one of ten counts and imposed a one-year suspension of petitioner's license. In addition, the court ordered petitioner to pay the costs of the disciplinary proceeding in the amount of $18,532.80 within one year of the date

of its order or face revocation of his license. Petitioner's motion for reconsideration of the court's April 24, 1984 decision was denied on May 24, 1984.

A petition for a writ of certiorari was filed on June 14, 1984, and served on respondent on July 16, 1984.

The jurisdiction of this court is invoked under 28 U.S.C. sec. 1257(3), in that, among other things, the decision and order of the Wisconsin Supreme Court was based in part on a standard of review adopted during the pendency of petitioner's disciplinary proceeding and therefore violated his due process rights secured under the Fifth and Fourteenth Amendments.

REASONS FOR NOT GRANTING WRIT

There Is No Important Federal Question Presented.

A. Miscellaneous claims

The issues outlined in the petition do not fulfill the criteria for review on certiorari as laid out in Rule 17 and in the prior decisions of this Court. The questions posed by petitioner are both repetitive and argumentative and, therefore, do not comply with Rule 21.1(a). Petitioner has failed to explain in what respects the Wisconsin Supreme Court's order impaired an obligation of contract, violated the Commerce Clause, deprived him of property without just compensation, denied him his right to effective counsel and denied him equal protection under the law. Also, petitioner has not stated why these so-called federal

questions are so important that the Court ought to exercise its discretion in granting review.

Petitioner's rambling and imprecise recitation of the facts and statement of the case leave the distinct impression that he seeks de novo review of the evidence adduced at the state disciplinary hearing. Such review is clearly inappropriate and is an insufficient basis on which to invoke the jurisdiction of the Court.

B. Retroactive application of the standard of review.

Arguably, the only question raised in the petition that deserves comment pertains to the retroactive application of the standard of review used by the Wisconsin Supreme Court and whether that procedural change, as applied to

petitioner, violated his due process rights. That question is without substantial federal importance.

Petitioner actually framed the issue in terms of the Ex Post Facto Clauses in Art. I, secs. 9 and 10 of the United States Constitution. Those provisions do not apply in this case. The Court has consistently restricted the application of these clauses to acts of the Legislature. Marks v. United States, 430 U.S. 188, 191 (1977); Frank v. Mangum, 237 U.S. 309, 344 (1915); Calder v. Bull, 3 Dall. 386 (1798). But the Wisconsin Supreme Court's decision to announce a new standard of review in attorney disciplinary cases was a judicial and not a legislative act. Thus, the constitutional prohibitions against ex post facto laws are not pertinent here.

Between the time of petitioner's hearing before the referee and the order suspending his license, the Wisconsin Supreme Court issued its decision in Disciplinary Proceedings Against Swartwout, 116 Wis. 2d 380, 342 N.W.2d 406 (1984). In that case, the court announced in dictum a change in its procedure for reviewing the referee's findings:

> In an attorney disciplinary proceeding, we review the referee's findings of fact and adopt them unless they are clearly erroneous. This is the standard of review by which we review judicial disciplinary proceedings, In Matter of Complaint Against Seraphim, 97 Wis. 2d 485, 509, 294 N.W.2d 485 (1980), Disciplinary Proceedings Against Guay, 101 Wis. 2d 171, 178, 303 N.W.2d 669 (1981), and the standard made applicable by statute to findings of fact made by a referee appointed by a trial court in an action tried without a jury, sec. 805.06(5)(b), Stats. Any

> language in our prior opinions to the effect that we conduct a de novo review of the record and independently make factual findings is no longer applicable to attorney disciplinary proceedings.

Swartwout, 116 Wis. 2d at 382-83, 342 N.W.2d at 407.

In Swartwout, it appears that the court was bringing its review procedures into line with those used in other types of disciplinary proceedings and with the statutes. The bulk of its earlier decisions discussing its de novo standard predated the 1980 amendments to the court's rules which incorporated by reference the Wisconsin Rules of Civil Procedure to attorney disciplinary cases when the rules did not provide otherwise. The disciplinary rules are silent on the applicable standard of review; thus the "clearly erroneous" standard in sec. 805.06(5)(b), Wis.

Stats., automatically applies to the review of the referee's findings. In practical effect, the court's decision in Swartwout did not so much change as clarify the applicable law.

Even if it were concluded that a new standard of review had been applied retroactively in petitioner's pending case, petitioner has not shown how such change denied him due process of law. He still had a full evidentiary hearing on the professional misconduct charges. He was able to confront witnesses against him and to present evidence in his own behalf. In brief, he was afforded the full panoply of procedural rights secured under the United States Constitution. Petitioner has not stated how his misplaced reliance on the possibility of de novo review of the hearing record would have

changed the outcome of the case. He has not shown why the so-called change in procedures tainted the fairness of the proceeding. See Chevron Oil v. Huson, 404 U.S. 97 (1971).

Petitioner had his day in court; his insistence on de novo review indicates his belief that he was entitled to a week.

The Wisconsin Supreme Court's decision in this case is not inconsistent with federal constitutional principles and raises no federal questions meriting review by this court.

CONCLUSION

For the reasons cited above, the Court should deny certiorari.

Respectfully submitted,

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